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INTEREST OF AMICI CURIAE

The National Association of Home Builders ("NAHB") is a not-for-profit corporation organized under the Not-for-Profit Corporation Law of the State of Illinois. NAHB represents over 183,000 builder and associate members organized in approximately 850 affiliated state and local associations located in all fifty states, the District of Columbia, and Puerto Rico. NAHB's members include not only individuals and firms that construct and supply single family homes, but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The International Council of Shopping Centers, Inc. ("ICSC") is a not-for-profit corporation organized under the Not-For-Profit Corporation Law of the State of Illinois. ICSC is the trade association for the shopping center industry. It has over 27,000 members worldwide of which 25,000 are based in the United States. ICSC's members include developers, retailers, lenders, owners, managers and all others having a professional interest in the shopping center industry. Its members own and manage virtually all of the 40,000 shopping centers in the United States. In 1993, these centers accounted for $830.2 billion in retail sales, representing 55 percent of all non-automotive retail sales and employed over 10 million people, 9 percent of the total non-agricultural employment in the United States.

Members of NAHB and ICSC are directly impacted by the prohibition against "take" of endangered species contained in Section 9 of the Endangered Species Act (the "Act") [16 U.S.C. § 1538(a)(1)]. The expansion of the definition of "take" in Section 3 of the Act [16 U.S.C. § 1532(19)] by 50 C.F.R. 17.3 to include harm resulting from habitat modification

has materially affected the development of land and construction of residential, commercial, industrial and retail buildings. The costs and delays associated with obtaining permits to "take" the habitat of protected species pursuant to Section 7 (16 U.S.C. § 1536) or Section 10 (16 U.S.C. § 1539) of the Act fall primarily on the landowners, developers, and builders that comprise the membership of NAHB and ICSC. These costs are ultimately passed on to consumers in the form of higher rents and retail prices and increased home prices.

STATEMENT OF THE CASE

Amici adopt the statement of the case contained in the brief for Respondents.

SUMMARY OF ARGUMENT

The Secretary's expansion of the definition of "harm" in 50 C.F.R. 17.3 is not necessary to accomplish the enunciated goal of the Act of preserving the ecosystems upon which endangered and threatened species depend. Congress has authorized a comprehensive program including a number of regulatory mechanisms, which taken together provide protection to the critical habitat of protected species. If Congress had intended to prevent adverse modification of critical habitat through the Section 9 take prohibition, it would not have authorized other mechanisms specifically directed toward the protection of critical habitat.

The failure of the Secretary of the Interior ("Secretary") to designate critical habitat, which is the linchpin of the regulatory process, has led to excessive and unwarranted reliance on the Section 9 take prohibition. Failure to designate critical habitat undermines the effectiveness of other regulatory mechanisms, especially the development of recovery plans for

protected species, and creates major and unnecessary burdens on landowners seeking incidental take permits pursuant to Section 7 and Section 10 of the Act.

The 1982 amendment to Section 10(a) of the Act did not expand the definition of harm or the scope of the Section 9 take prohibition. The Section 7 Federal agency consultation process is designed to ensure that any proposed adverse modification of critical habitat will not jeopardize the survival of the protected species. The Section 10 permit process, which applies when there is no Federal agency involvement, embodies the same jeopardy standard. The Act expressly regulates the adverse modification of habitat through Section 7 jeopardy determinations only. There is no basis for extending protections against habitat modification to situations not subject to Section 7 or Section 10.

The Secretary's expansive definition of harm has placed significant burdens on private landowners. In practice, the artful distinctions within the definition of harm are ignored and habitat modification is equated with take. The misapplication of the prohibitions, coupled with the failure of the Secretary to designate critical habitat, distorts the Section 10 habitat planning process and creates disincentives for landowners to participate in the process.

ARGUMENT

1. CONGRESS HAS PROVIDED A COMPREHENSIVE, INTEGRATED, AND SEQUENTIAL REGULATORY PROCESS TO PROTECT THE CRITICAL HABITAT OF ENDANGERED AND THREATENED SPECIES WHICH MAKES THE SECRETARY'S EXPANSION OF THE DEFINITION OF HARM UNNECESSARY.

One of the goals of the Act is the protection of the habitat, and Congress has provided a comprehensive regulatory program for accomplishing that goal. The Secretary has failed to designate critical habitat [1/] and to develop recovery plans for most protected species. Due to such failure, the Fish and Wildlife Service has come to rely primarily on the listing process and the prohibition against take to achieve the Act's overall goals. In practice, the take prohibition is being invoked by the Secretary to accomplish the specific regulatory tasks that Congress intended the critical habitat and recovery plan procedures of the Act to achieve.

1/ As of 1991, the Secretary had only designated critical habitat for 16 percent of all listed species. Endangered Species Act, Types and Numbers of Implementing Actions, Briefing Report to the Chairman, Committee On Science, Space and Technology, House of Representations, at 29 (General Accounting Office, May, 1982).

A. Congress Has Provided The Secretary With a Number of Regulatory Mechanisms to Provide for the Long-Term Protection of Habitat.

As articulated by Congress, the purposes of the Act is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species" [16 U.S.C. § 1531(b)]. The definition of "conservation," 16 U.S.C. § 1532(3) and the phrase "to provide a program," evidence Congressional intent to use a range of tools, rather than the Section 9 taking prohibition, to accomplish the goals of the Act. Conservation is defined to include "all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, line trapping, and transplantation."

The regulatory mechanisms which Congress contemplated would be included in the program are the listing procedure, the Section 9 prohibition against "take," the designation of critical habitat under Section 4(a), the issuance of special management rules under Section 4(d), the promulgation of recovery plans pursuant to Section 4(f), the Section 7 and Section 10 incidental take permit processes, and the direct acquisition of habitat land authorized by Section 5. The prohibition against take in Section 9, by itself, neither prohibits habitat modification nor constitutes a program for habitat protection, but is only the first step in a lengthy and comprehensive regulatory process. The regulatory process is designed to proceed in a logical sequence beginning with the listing of a species as endangered or threatened, followed by the designation of one or more areas as critical habitat, and culminating in the issuance of a recovery plan. Only when all

of these measures are implemented can protection of species and their habitats be achieved.

Congress also directed the Secretary to prepare recovery plans for the conservation and survival of protected species. 16 U.S.C. § 1533(f). Each plan is required to incorporate (1) "a description of such site specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species," 16 U.S.C. § 1533(f)(1)(B)(i), (2) "objective, measurable criteria which when met, would result in a determination . . . that the species be removed from the list," 16 U.S.C. § 1533(f)(1)(B)(ii), and (3) "estimates of time required and the cost to carry out those measures needed to address the plan's goal," 16 U.S.C. § 1533(f)(1)(B)(iii).

The Secretary has discretion not to prepare a recovery plan if the Secretary finds that such a plan will not promote the conservation of the species, 16 U.S.C. § 1533(f)(1). Due to inadequate resources, the Secretary has completed few critical habitat designations. As a result, the level of scientific information required to develop effective recovery plans is generally not available.

Congress has also provided for two types of permits which authorize the incidental take of a protected species. Section 7 provides for consultation between the Fish and Wildlife Service and any Federal agency which proposes to authorize, fund or carry out an activity which could result in jeopardy to a protected species. Section 10 provides a process for private landowners to obtain take permits when there is no Federal agency involvement in an otherwise lawful activity. Under both of these permit procedures, adverse modification of critical habitat is allowed unless the Secretary makes a formal

determination that the survival of the protected species is in jeopardy.

B. The Failure of the Secretary To Designate Critical Habitat Has Led To Unjustified Reliance on the Section 9 Take Prohibition.

The designation of critical habitat is the linchpin to the regulatory process. Critical habitat is defined in 16 U.S.C. § 1532(5)(A)(i) to include specific areas occupied by the species "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." The characteristics of critical habitat "include (1) space for individual and population growth, (2) nutritional or physiological requirements, (3) cover or shelter, (4) sites for breeding, reproduction, rearing of offspring, germination or seed dispersal, or (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of a species." 50 C.F.R. 424.12. Congress has created specific mechanisms for designating critical habitat, including provisions for separate rulemakings and standards for the sufficiency of scientific information. Petitions to designate critical habitat are (as well as listing petitions) governed by 5 U.S.C. § 553(e) and 16 U.S.C. § 1533. The Secretary is required to designate "any habitat of such species which is then considered to be critical habitat" concurrently with any listing of the species as endangered or threatened. 16 U.S.C. § 1533(a)(3).

Congress distinguished between the narrower concept of modification of critical habitat and modification of historic habitat. Critical habitat may also include areas outside the geographical area occupied by the species at the time it is listed as endangered or threatened "upon a determination by

the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Act creates a presumption that critical habitat shall not include the entire geographical area which can be occupied by the protected species "except in circumstances determined by the Secretary." 16 U.S.C. § 1532(5)(C). These express grants of discretion to the Secretary make it clear that adverse modification of critical habitat cannot be equated with adverse modification of historic habitat. The Secretary must determine whether a proposed modification of critical habitat will put the protected species in jeopardy pursuant to the consultation process provided in Section 7 of the Act.

At the time of listing of an endangered species, the Secretary has the discretion to exclude any area from critical habitat if "he determines that the benefits of such exclusion outweigh the benefits of specifying such area as critical habitat." 16 U.S.C. § 1533(b)(2). Pursuant to 50 C.F.R. 424.12, there are two distinct grounds for not making a determination of critical habitat at the time of listing: (1) that such a designation would not be prudent or (2) critical habitat cannot be determined: This grant of discretion to the Secretary to avoid the obligation to designate critical habitat in these kind of special circumstances is consistent with the definition of harm enunciated by the Court of Appeals, i.e., the direct application of force against individual members of a protected species.

The regulations state that a designation of critical habitat by the Secretary is not prudent where the "species is threatened by taking or other business activity, and identification of critical habitat can be expected to increase the degree of such threat to the species," 50 C.F.R. 424.12(a)(1)(i) or "such designation of critical habitat would not be beneficial to the species," 50 C.F.R. 424.12(a)(1)(ii). The "prudent" standard is designed to prevent human predation in the form of

the direct application of force, which the Court of Appeals determined to constitute "harm" within the definition of take contained in 16 U.S.C. § 1532(19). Designating the last known habitat areas of a species could accelerate the depletion of a protected species by either attracting trophy hunters in the case of game species or encouraging excessive collection of non-game species for scientific purposes.

Furthermore, the Secretary is not obligated to designate critical habitat when the location or extent of such habitat is not determinable. Critical habitat cannot be determined when "information sufficient to perform required analysis of the impacts of the designation is lacking" 50 C.F.R. 424.12(a)(2)(i) or "the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat," 50 C.F.R. 424.12(a)(2)(ii).

The Act also makes a distinction between the amount of scientific information necessary to support listing a species as endangered or threatened, on the one hand, and the designation of critical habitat, on the other. Evidence may be sufficient to support a finding that a species is endangered or threatened pursuant to Section 4(a), although such evidence would be inadequate to support a determination of critical habitat pursuant to Section 4(b).

The express recognition of separate petition processes for listings and critical habitat designations, the independent discretion retained by the Secretary regarding critical habitat designations and the different levels of scientific information required to support listings and critical habitat designations, demonstrate that Congress has clearly distinguished between the listing process which triggers the take prohibition of Section 9 and the designation of critical habitat. If Congress intended the meaning of harm within the definition

of take in Section 9 to have included the "adverse modification of habitat where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering," then there would not have been any need to establish a separate process and higher standards of scientific evidence for designating critical habitat which encompass the same criteria.

C. The Secretary's Claim That Protection of The Habitat for Endangered Species Is To Be Accomplished Through The Take Prohibition Is Without Merit.

The claim by the Secretary that the ambitious goal of protecting the habitat of endangered and threatened species is to be accomplished through the take prohibition of Section 9 is without merit. The intent of Congress is to limit the take prohibition to "cease and desist" situations, where individuals of a protected species are at risk of imminent death from the direct application of physical force. As correctly stated by the Court of Appeals below, "Congress clearly did not have so massive an expansion of government power on so slight a nail as § 9's provision that no one should "harass, harm, pursue, pressure, hunt, shoot, wound, kill, trap, capture or collect an endangered species." Sweet Home Chapter of Communities For a Greater Oregon, 30 F.3d 190 (D.C. Cir. 1994), 193.

The Court of Appeals properly recognized that the Secretary has additional conservation responsibilities under the Act and cannot rely on private property owners subject to the Section 9 take prohibition to accomplish the larger goals of the Act. "Extending the word harm to reach habitat modification as so conceived carries Section 9's prohibition far beyond the reach effected by all the other terms used in the definition; it applies to every citizen duties the Act expressly

imposed only on federal government agencies." Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt, 30 F.3d 190 (D.C. Cir. 1994), 193.

2. THE EXISTENCE OF A PERMIT PROCESS DOES NOT EXPAND THE SCOPE OF THE HARM DEFINITION TO INCLUDE MODIFICATION OF HABITAT.

Congress provided relief from the prohibition against take by adoption of Sections 7 and 10 of the Act. Permits under these sections of the Act may be issued only when the proposed take of the protected species is incidental to an otherwise lawful activity. A permit cannot be issued for an intentional taking such as one involving the direct application of force to harm an individual of a protected species.[2/] Prior to approving any permit, the Secretary is required to issue a biological opinion and to make a determination that the proposed action will not lead to the adverse modification of critical habitat that would jeopardize the survival of the species.

2/ See Preliminary Draft Handbook for Habitat Conservation Planning and Incidental Take Permit Processing, Fish and Wildlife Service, U.S. Department of the Interior, September 15, 1994, p. 80:

> "All taking of a federally listed fish and wildlife species as detailed in the conservation plan, must be incidental to otherwise lawful activities and not the purpose of such activities. For example, deliberate shooting or wounding (of) a listed species would not be considered incidental take and under no circumstances would qualify for an incidental take permit."

A. The Section 7 Consultation Process Requires That Federal Agencies Adopt Measures to Minimize Adverse Modification Only Where Habitat Has Been Designated As Critical.

Section 7 of the Act requires any Federal agency contemplating an action that could impact a protected species or its critical habitat to consult with the Secretary to minimize any adverse impacts. The Section 7 consultation process applies to any action authorized, funded or carried out by a Federal agency.

The agency and the Secretary together have an obligation to insure that the proposed action "is not likely to jeopardize the continual existence of any endangered species or result in the destruction or adverse modification of habitat of such species or result in the destruction or adverse modification of habitat of such species, which is determined by the Secretary . . . to be critical" (emphasis added), 16 U.S.C. § 1536(a)(2). Section 7 of the Act contains other references to a "jeopardy" standard applicable to adverse modification of critical habitat, including a provision setting forth the contents of the Secretary's written jeopardy determination, 16 U.S.C. § 1536(b)(3). In those situations where jeopardy in the form of adverse modification of critical habitat is found, the Secretary is required to "suggest those reasonable and prudent alternatives which . . . can be taken by the Federal agency or applicant in implementing the agency action," 16 U.S.C. § 1536(b)(3)(A).

Based upon the language of the statute, Congress assumed that critical habitat would be designated, that the designation would be based upon the best scientific and commercial data available, and that the Secretary would have this information available when preparing jeopardy determinations and issuing biological opinions pursuant to

Section 7 of the Act. Excessive reliance by the Secretary on the definition of harm as including adverse modification of habitat, as applied to private landowners through the Section 9 take prohibition, creates significant problems in the context of a Section 7 consultation. If the Secretary has not fulfilled his duty to designate critical habitat, the costs and delays associated with developing adequate information on the location and distribution of the potential species and the extent and quality of its remaining habitat falls on the private landowner seeking approval for a project.

B. Section 10 Embodies the Same Jeopardy Standard as Section 7 and Does Not Expand the Definition of Harm.

The 1982 amendments to the Act expanded Section 10 and created a new form of permit authorizing an incidental take to be utilized when the Section 7 consultation process is not available. A permit applicant under Section 10 must submit a conservation plan, commonly referred to as a habitat conservation plan ("HCP") which specifies (1) the likely impact of the proposed taking of a protected species, (2) steps the applicant will take to minimize and mitigate such impacts and the funding available to implement such steps, (3) a discussion of alternative actions considered and the reasons for rejecting those alternatives, and (4) any other measures the Secretary may require as being necessary and appropriate. 16 U.S.C. § 1539(a)(2)(A).

In order to approve an incidental take permit, the Secretary must make a determination that (1) the proposed taking is incidental to an otherwise lawful activity, (2) that the applicant will minimize and mitigate the impacts of such a taking to the maximum extent practicable, (3) that adequate funding exists to implement the plan, (4) that any additional

measures required by the Secretary will be enforceable, and (5) that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." 16 U.S.C. § 1539(a)(2)(B).

The "not appreciably reduced standard" is the same jeopardy standard contained in Section 7(a)(2), "not likely to jeopardize the continued existence." The equivalency of these standards is supported by legislative history, interpretations of the meaning of applicable law by the Secretary, and expert commentators. The legislative history makes the linkage between the two provisions explicit.[3/] Even the Secretary has acknowledged that the jeopardy provisions of Section 10 and Section 7 are equivalent.[4/] The central

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3/ "The Secretary will base his determination as to whether or not to grant the permit, in part, by using the same standard as found in Section 7(a)(2) of the Act, as defined by Interior Department regulations, that is, whether the taking will appreciably reduce the likelihood of the survival and recovery of the species in the wild." H.R. Conf. Rep. No. 835, 97th Cong. 2d Sess. 29, reprinted in 1982 U.S. Code Cong. & Admin. News 2807, 2870.

4/ This is a critically important criterion under Section 10(a)(1)(B) of the ESA because it involves the efforts of the project on the survival of the listed species. Furthermore, its wording is the same as the "jeopardy" definition under Section 7 regulations (50 C.F.R. Part 402.02), which defines the phrase "jeopardize the continued existence" to mean "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers or distribution of that

importance of the jeopardy standard has also been noted by an expert commentator.[5/]

The Secretary must prepare a biological opinion and jeopardy determination for each HCP application, which is the functional equivalent of the jeopardy determination required under Section 7.

C. Designation of Critical Habitat Is a Prerequisite to an Effective Habitat Conservation Plan.

Congress recognized that the identification of critical habitat is a key component of any HCP. The 1982 amendments to Section 10(a) expressly approved the San Bruno Mountain HCP for a portion of San Mateo County, California. House Conf. Rep. No. 835, 97th Cong. 2d Sess. 32, reprinted in 1982

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species." Preliminary Draft Handbook For Habitat Conservation Planning and Incidental Take Permit Processing, Fish and Wildlife Service, U.S. Department of the Interior, September 15, 1994, 81-82.

5/ The legislature history of Section 10(a) suggests that the "not appreciably reduce the likelihood of the survival of the species in the wild" standard incorporation in Section 10(a)(2)(B)(iv) is the most substantive requirement in the Section 10(a) incidental taking permit process. While the USFWS and NMFS have considerable freedom in deciding when and how to issue incidental take permits, they cannot issue permits that will violate that standard. F. Cheever, An Introduction To The Prohibition Against Takings In Section 9 Of The Endangered Species Act Of 1973: Learning To Live With A Powerful Species Preservation Law, 62 Univ. of Colorado L.R. 109, 170 (1991).

U.S. Code Cong. & Admin. News 2807, 2873 notes with approval that: "Prior to developing the conservation plan, the County of San Mateo conducted an independent exhaustive biological study which determined the location of the butterflies, and the location of their food plants. The biological study also developed substantial information regarding the habit and life cycles of the butterflies and other species of concern." This level of biological information, which formed the basis for the San Bruno Mountain HCP, fits the definition of critical habitat in 16 U.S.C. § 1532(5)(A)(i): "the specific areas within the geographic area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which require special management considerations or protections."

When the Secretary approved the San Bruno Mountain HCP and issued the Section 10(a) incidental take permit, a group opposed to the proposed development challenged the approval. Friends of Endangered Species v. Jantzen, 760 F.2d 976 (Ninth Circuit, 1989). The Court of Appeals noted that a complete biological report had been prepared and that 86 percent of the habitat of the Mission Blue butterfly, one of the endangered species covered by the San Bruno Mountain HCP, was permanently protected. Under these circumstances, the Court of Appeals found that the Secretary's decision to allow a taking in the form of adverse modification of the other 14 percent of the Mission Blue's habitat did not appreciably reduce the likelihood of the survival of the species.

Protection of critical habitat in instances where the Section 7 consultation process is not available occurs through the issuance of a HCP. As noted in Endangered Species Act, Information on Species Protection on Nonfederal Lands, Report To The Chairman, Committee on Merchant Marine and

Fisheries, House of Representatives (General Accounting Office, 1994), "Critical habitat designated on nonfederal lands receives protection under ESA only when an activity affecting that habitat is included in a consultation under § 7." When a HCP application is subjected to a Section 7 consultation as part of the Secretary's review process, the distinction between protection of critical habitat on federal and non-federal lands disappears. If critical habitat is protected only in the context of a Section 7 or Section 10 permit process, it is difficult to understand how noncritical habitat is entitled to protection outside Section 7 and Section 10. If Congress intended Section 9 to protect the adverse modification of habitat, it would not have created the Section 7 and Section 10 regulatory mechanisms.

Given this interplay between the provisions of Section 7 and Section 10 and the resulting focus on protecting critical habitat, the Secretary's equating of habitat modification with harm is not justified because Congress has provided specific mechanisms for protecting critical habitat for all types of actions, whether or not they involve a Federal action. The Secretary does not need to resort to an overbroad definition of harm and the application of the take prohibition of Section 9 to accomplish the goal of preserving the ecosystems on which protected species depend.

3. APPLICATION OF THE SECRETARY'S REGULATORY DEFINITION OF HARM CREATES MAJOR BURDENS FOR PRIVATE LANDOWNERS AND DISCOURAGES THE BROADER USE OF THE SECTION 10 HCP PROCESS.

The Section 10 process is often championed as a flexible and creative mechanism for private landowners to resolve disputes arising under the Act. In practice, however, it suffers from the same problems as the Section 7 consultation process when the Secretary has not designated critical habitat or developed plans for recovery of the protected species. As the Act is currently administered, private landowners seeking a Section 10(a) permit must complete all of the regulatory steps assigned to the Secretary, including delineation of critical habitat and development of a long-term plan to preserve the species which is adequately funded and legally enforceable.

In the context of the HCP planning process, the failure of the Secretary to designate critical habitat creates a situation where any habitat modification could be deemed to constitute harm to the species and trigger the Section 9 take prohibition. Petitioners claim that the words in 50 C.F.R. 17.3 effectively limit the type of habitat modification which constitutes harm to situations "where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." However, this language offers little protection to private landowners because the Field Offices of the Fish and Wildlife Service that implement the Act do not draw such a distinction. Habitat modification is equated with take and the landowners have the burden of proving that their proposed actions will not harm the species. Landowners are asked to survey their own properties, submit the data to the Fish and Wildlife Service, and forgo the

economic use of their properties until the Section 10(a) permit is issued.

Because the Secretary retains some discretion to not designate critical habitat at the time a species is listed as endangered or threatened, the government may avoid potential Fifth Amendment claims by not designating critical habitat. Critical habitat must be defined by specific limits using reference points and lines as found on standard topographic maps of the area. 50 C.F.R. § 424.12(c). Such delineations put landowners on notice that they may have potential eminent domain claims for taking of their property without compensation. Failure to designate critical habitat, coupled with the Secretary's existing interpretation of harm to include habitat modification, leaves landowners in a regulatory twilight zone, with no means to exhaust administrative remedies or any effective method to demonstrate the futility of pursuing such remedies, which are preconditions to bringing a Fifth Amendment claim. As previously noted, the Secretary had only designated critical habitat for 16 percent of all listed species as of 1991.

The Stephens Kangaroo Rat ("SKR") controversy provides excellent examples of the disincentives created by the current misadministration of the Act. The SKR is found primarily in grassland habitats located in Riverside County, California. It was listed as an endangered species on September 30, 1988, 53 Fed. Reg. 38469. The County Board of Supervisors (the "Board"), in cooperation with affected landowners, established a program to ensure compliance with the Act by preparing a Short-term HCP. On November 15, 1988, the Board adopted an ordinance establishing a series of SKR Study Areas. Riverside County's designation of the Study Areas, which were presumed to be SKR habitat, was presumed erroneously to be Section 9 take.

The Board subsequently established a mitigation fee of $1,950.00 per acre which was assessed on all development projects within a major portion of the SKR's historic range. The purpose of the fee was to pay for the development and the acquisition and management of habitat preserves. The mitigation fee was imposed without regard to whether the land actually contained SKR habitat, or whether such development would result in loss or degradation of any such habitat. The Fish and Wildlife Service issued a Section 10(a) permit for the Short-term HCP on August 1, 1990.

On at least one known occasion, the Fish and Wildlife Service has advised a developer that a landowner is presumed to be guilty of violating the Act until proven innocent. In January, 1989, Friedman Homes was grading the site of a 462 lot single family subdivision near Lake Elsinore when an employee of the Fish and Wildlife Service appeared and threatened the project manager, Bob Deihl, with arrest and fines if the grading operations did not cease immediately. Deihl was sufficiently convinced of the seriousness of the situation that he authorized the grading to be stopped and returned to his employer's corporate office.

A month later, the Fish and Wildlife Service provided Friedman Homes with a list of five approved biologists and requested that a report be prepared containing any evidence that the SKR was <u>not</u> present on site. In March, 1989, Friedman Homes hired Tierra Madre, a local biological consulting firm on the approved list. During April and May, Tierra Madre conducted three nights of trapping and identification (SKRs are nocturnal). No SKRs were found. The report was filed with the Fish and Wildlife Service at the end of May.

Grading resumed approximately three weeks later. In July, 1989, employees of the Fish and Wildlife Service reappeared at the job site and stated that they disagreed with the report prepared by their recommended biologist. They were confident that SKRs must be present somewhere on the site. They also demanded to know why the developer had waited less than three weeks from the time the biological report was submitted before resuming grading. The developer received a verbal warning that the statute of limitations under the Act was five years and that he could be arrested at any time before the period expired. The statute of limitations has run without any arrests.

Nevertheless, the Fish and Wildlife Service's actions had a number of direct economic impact on the project. The contract price for the grading work was $4,100,000. Because the site was shut down, the grading contractor had to seek replacement work. During the month of work stoppage, the contractor's crew of 30 employees was unemployed. Friedman Homes was financing its development work with a $5,500,000 loan secured by the property. The interest cost of carrying the indebtedness for an additional five months was approximately $250,000. The biological consultants cost approximately $5,000. The SKR mitigation fee was also imposed on each lot. As a result of these costs, $800 was added to the purchase price of each home and over a 30 year term would cost homebuyers $2,720 per unit. Multiplied by 462 lots, the additional cost arising out of the misapplication of the Act could reach $1,256,640.

We respectfully urge the Court not to conclude from the lack of reported appellate cases that the misadministration of the Act by the Secretary has not violated property rights. Illustrative of the infringements to property rights is the experience of the Lusk Company, a landowner and developer

of an area known as Menifee Village in Riverside County, California. Lusk entered into a Development Agreement with the County on November 8, 1988, pursuant to California law, which vested certain development rights, prior to the designation of the study areas and imposition of the fees by the Board. In 1991, Lusk sought grading permits and was informed that the company must pay $2,350,042.50 in mitigation fees upon issuance of the grading permits. In order to obtain the necessary permits, Lusk paid the fees under protest, as provided by California law, and filed suit against the County on July 22, 1991, in Superior Court for the County of Riverside.

The suit sought the refund of fees paid with interest, damages, and attorneys' fees. The complaint alleged that there was no reasonable relationship between the fees charged for the particular type of development and the costs of preparing and implementing a HCP because agricultural developers paid different fees than those paid by residential developers. Lusk also argued that at least partial mitigation of any impacts on SKR habitat had already been addressed in the Development Agreement which obligated the company to pay $260 per residential unit into an open space land bank established to provide, inter alia, for habitat conservation.

Much of Lusk's property was either unoccupied habitat or unsuitable habitat. In the absence of a critical habitat designation and a jeopardy determination, there was no justification for characterizing the modification of these non-habitat areas as take requiring mitigation. Although the matter was settled before trial and Lusk received a partial refund of its SKR mitigation, Lusk's experience proves that the misadministration of the Act encourages unnecessary litigation and delays development in an industry which is time sensitive.

The problems resulting from the application of a broad definition of harm to include habitat modification, when actual habitat has not been designated for a species, become more severe when a property contains a substantial amount of occupied habitat. Tom and Janice Morger own 949.66 acres of land in Riverside County, which they purchased in portions between 1984 and 1990 with profits from their wig-making business. They intended to retire to the property and establish a citrus orchard. They moved two homes to the property. When they attempted to obtain permits to attach their homes to permanent foundations, they were informed by the County that the property was within a SKR Study Area and that a complete prohibition against take applied.

Realizing that they did not have the financial means to challenge the County, and fearing prosecution for an unauthorized take of a protected species, the Morgers entered into an option agreement with the Baldwin Company, a developer and homebuilder, on November 27, 1989, with a purchase price of $18,690,000 or $19,681 per acre, due upon exercise of the option. The Baldwin Company initiated the preparation of a Specific Plan for the property which proposed development of a mixture of residential, commercial and open space uses including an estimated 2,400 dwelling units.

The Baldwin Company contracted for a biological study. The survey divided the property into low, medium and high habitat values. The petition for removal proposed that all low value habitat and part of the medium value habitat be removed in exchange for the dedication of the high value habitat. The survey also determined that 100 acres of the property was occupied SKR habitat. The Morgers then filed a request with the Riverside County Habitat Conservation Agency, a joint powers agency established to implement the

Short-term HCP, to remove their property from the Study Area.

In 1990, the County initiated an abatement action, demanding that they demolish the two homes which had fallen into disrepair. When the Morgers responded that the County would not allow the construction of a road to the homes without the approval of the Fish and Wildlife Service and the Habitat Conservation Agency, the County dropped the suit. In July, 1991, the Baldwin Company ceased its efforts to process the Specific Plan and the option expired.

The Morgers filed an individual Section 10(a) permit application in 1993, but the Secretary has taken no action. In November, 1994, the Habitat Conservation Agency denied the Morger's request to be removed from the Study Area. They had expended more than $70,000 in legal fees on the relief application. Having exhausted all other remedies exhausted, the Morgers filed suit against the Habitat Conservation Agency and Riverside County on November 14, 1994, in Superior Court for the County of Riverside, seeking damages for inverse condemnation and declaratory relief. Even though only a small portion of their approximately 950-acre parcel is occupied habitat, the Morgers have effectively been denied all use of their property for over six years.

One final example illuminates the negative impact of the current regulatory definition of harm and the inequitable result of the Secretary's failure to designate critical habitat. Mike Rowe purchased 20 acres in Riverside County in the 1980's with the intention of building a home for his wife and three children. The Rowes moved into the existing one-bedroom home on the property where they intended to live temporarily until their new home was constructed. In 1991, Mr. Rowe applied for a building permit and was informed by the County that his property was located in a SKR Study Area.

The new home was to be built immediately adjacent to the existing one, in an area where the soil was compacted from years of use and was therefore not suitable for SKR habitat. In order to obtain a permit Mr. Rowe was required to obtain a biological survey.

Mr. Rowe has not performed a biological survey. He believes strongly that the collection of such data is the responsibility of the Fish and Wildlife Service. He has seen crows and raptors feeding on SKRs on his property. An expensive survey will only confirm the fact that SKRs are present. Rowe believes that because SKRs are present, he, like the Morgers, will be unable to get his property removed from the Study Area, even though he wants to build on a small portion of the total property which is not occupied by SKRs. The application for the Final SKR HCP has been submitted by the County to the Fish and Wildlife Service. He is unable to evaluate his legal options until the final HCP is approved and the SKR preserve areas are finalized.

These are real world problems that result from the use of the expansive definition of harm in 50 C.F.R. 17.3. While the Secretary claims that habitat modification is prohibited only when "it actually kills or injures wildlife by significantly impairing essential behavioral patterns," the Fish and Wildlife Service continues to exercise its veto over actions by local governments such as the County of Riverside and its Habitat Conservation Agency to provide relief to property owners with the habitat of protected species on their property by treating any habitat modification within a Study Area as take. The Fish and Wildlife Service is effectively placing the entire burden of determining critical habitat and planning for the recovery of the SKR on private landowners.

In good economic times, companies like Freidman Homes, Lusk and the Baldwin Company have the choice of challenging demands for excessive mitigations or passing the costs of compliance along to consumers. In less rosy economic times, neither option is available. Property owners, such as the Morgers and the Rowes, have few choices under any circumstances because they do not have the resources to vindicate their property rights.

4. CONCLUSION

This case was correctly decided by the Court of Appeals. Limiting the definition of harm to the direct application of physical force to individual members of a protected species is consistent with Congressional intent and the overall structure of the Act. If the decision below is upheld, the Secretary will retain significant authority to safeguard a protected species by designating critical habitat and minimizing or mitigating impacts on critical habitat through the Section 7 consultation process and the Section 10(a) incidental take permit process. Private landowners should not be forced to bear the considerable burdens imposed by the Act when these burdens were expressly assigned by Congress to the Secretary.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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